Supreme Court, U.S.
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No. 84-2009

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

DEL MONTE CORPORATION, A New York corporation,
R. J. REYNOLDS INDUSTRIES, INC., a Delaware corporation,
DEL MONTE SNACKS, INC., a California corporation,

Petitioners,

vs.

BARBARA BLAU, RAM BLAU, ANN MAYO and RICHARD LINDGREN, individually and on behalf of all other former employees of DEL MONTE SNACKS, INC., similarly situated,

Respondents.

RESPONSE OF ORGANIZATION RESOURCES COUNSELORS, INC. TO RESPONDENTS' BRIEF IN OPPOSITION TO MOTION OF ORGANIZATION RESOURCES COUNSELORS INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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INTRODUCTION

In their brief in opposition to the motion of Organization Resources Counselors, Inc. ("ORC") for leave to file an

amicus curiae brief ("Resp. Opp. Br."), Respondents assert that Rule 1.10(b) of the American Bar Association Model Rules of Professional Conduct mandates disqualification of ORC's counsel in this matter. As we demonstrate herein, Respondents' contention is wholly lacking in merit. The harsh disqualification remedy of Rule 1.10(b) simply does not apply to the facts and circumstances here present and, in any event, cannot serve as the basis for barring a non-lawyer party from serving in the vital role of amicus curiae.

A. Statement of Facts

1. In May 1985, Thomas C. Geiser and six other lawyers previously associated with the law firm of Hanson, Bridgett, Marcus & Vlahos joined the San Francisco office of Epstein, Becker, Borsody & Green, P.C. ("EBB&G"). While associated with Hanson, Bridgett, Marcus & Vlahos, Mr. Geiser had been involved in the initial development of this case on behalf of the Respondents. Rose Affidavit ("Exhibit A") at ¶ 6.

2. Unbeknownst to Mr. Geiser, ORC, an existing EBB&G client, subsquently retained Henry Rose, a partner in EBB&G's Washington, D.C. office, to prepare an amicus curiae brief favoring the granting of certiorari in this case. Prior to this time, ORC had not been in any manner involved in this litigation.

3. Mr. Rose prepared and filed the amicus curiae brief and accompanying motion without consulting with Mr. Geiser or any other attorney at EBB&G. Rose Affidavit at ¶ 3. Only after ORC's motion and brief were filed and Respondents opposed same did Mr. Geiser's prior involvement in the case come to light. Rose Affidavit at ¶ 6.

4. Mr. Rose has shared no information concerning ORC's position with any other lawyer of EBB&G and has received no information, beyond that contained in their petition itself, from anyone purporting to have represented Respondents at any time. Rose Affidavit at ¶ 7.

B. Argument

Respondents contend that Rule 1.10(b),[1/] a rule designed to protect former clients from subsequent use of confidential disclosures by their previous attorney(s), serves to bar ORC from having its amicus curiae brief considered by the Court. This contention is unfounded. As Respondents acknowledge, Rule 1.10(b) does not establish a per se standard for attorney disqualification, but rather requires a balancing of the competing interests of the former client (preserving

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1/ Rule 1.10(b) of the American Bar Association Model Rules of Professional Conduct provides: "When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter."

confidentiality and loyalty), the present client (having a reasonable choice of legal counsel) and attorneys (maintaining freedom to change employment) in light of the pertinent facts. In the instant matter, application of this Rule 1.10(b) balancing test weighs heavily against the imposition of the disqualification remedy for the following reasons:

1. Henry Rose, the individual counsel who prepared ORC's amicus curiae brief, received no information regarding this matter from any other lawyer of EBB&G. See Rose Affidavit at ¶¶ 3 and 7. Moreover, Mr. Geiser, a former member of Respondents' firm, was not even aware that an attorney in EBB&G's Washington, D.C. office was preparing an amicus curiae brief for ORC in the instant case until after the brief was actually filed. See Rose Affidavit at ¶ 4. Thus, there was no possible abuse of confidential information by EBB&G in this matter.

2. ORC is not a party to the instant action, but instead is appearing as amicus curiae to offer the Court assis-

tance in determining whether the petition for certiorari should be granted. Thus, ORC was not a player in developing either the factual or legal issues in the case, nor did it participate in this matter in the district court or court of appeals. Moreover, as an amicus curiae, ORC must take the case as he finds it, and is not permitted to create, extend or enlarge issues beyond those raised and argued by the parties. Town of Chino Valley v. City of Prescott, 131 Ariz. 278, 638 P.2d 1324, appeal dismissed, 457 U.S. 1101 (1982), reh'g. denied 459 U.S. 899 (1982); Equi-lease Corp. v. United States Fidelity & Guar., 262 Ark. 689, 565 S.W.2d 125 (1978).

Therefore, as counsel to ORC, EBB&G is situated in a different position than that found in the traditional cases discussing attorney disqualification issues, including those decisions cited in Resp. Opp. Br. See, e.g., Silver Chrysler Plymouth Inc. v. Chrysler Motor Corp., 518 F.2d 751 (2d Cir. 1975). EBB&G does not represent a party, and is not developing

the factual and legal issues in this case. Accordingly, traditional concerns regarding the possible use of confidential information by a client's former attorney are not present here, as whatever information Mr. Geiser may possess is entirely irrelevant to the issue of whether the Court should grant a petition for certiorari in this case.

3. Furthermore, the instant matter is not fact-based and does not involve the strategic sensitivities which may have existed at the trial court level. The amicus curiae brief prepared by ORC's counsel addresses issues of statutory construction and the appropriateness of a court of appeals conclusion that a reasonable interpretation of an employee benefit plan by the plan administrator may be held to be arbitrary and capricious by reason of its noncompliance with the reporting and disclosure requirements of the Employee Retirement Income Security Act of 1974 ("ERISA"). ORC's brief also

suggests that an early resolution of the issues raised by Petitioners is important to the day-to-day administration of over 2.3 million employee benefit plans. Thus, the alleged conflict-of-interest issue evaporates as the brief prepared by EBB&G for ORC bears absolutely no relationship to any facts of which Mr. Geiser may have become aware while an attorney at Respondents' law firm.

C. Conclusion

As recently reiterated by the Court of Appeals for the Seventh Circuit, the disqualification of an attorney is a "drastic measure which courts should hesitate to impose except when absolutely necessary." Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983) (quoting Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982)). The facts and circumstances discussed supra clearly do not warrant imposition of the drastic remedy of disqualification. Moreover, Rule 1.10(b) cannot serve to bar a non-lawyer party from serving in the

vital role as amicus curiae.

Accordingly, for the reasons set forth herein, ORC respectfully submits that Respondents' basis for opposition for leave to file an amicus curiae brief should be rejected.

Respectfully submitted,

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Amicus Curiae

Dated: August 30, 1985

Exhibit A

AFFIDAVIT OF HENRY ROSE

I, Henry Rose, being duly sworn, certify:

1. I am counsel of record to Organization Resources Counselors, Inc. (ORC) in the captioned case and a partner at the Washington, D. C. office of Epstein Becker Borsody & Green, P.C. (EBB&G).

2. On behalf of ORC, I filed a motion in this Court for leave to file a brief, amicus curiae, in support of the petition for certiorari in the captioned case. The motion was filed at about noon on July 26, 1985, together with the proposed brief.

3. I had responsibility for the preparation of the motion and brief. No other lawyer of EBB&G participated in the preparation of the motion or

brief. Nor were any of the points made in either the motion or brief discussed with any other lawyer of EBB&G prior to the filing.

4. In the afternoon of July 26, 1985, David W. Baer, Esquire, one of the attorneys for the respondents, informed me by telephone that Thomas C. Geiser, Esquire who had joined EBB&G in May, 1985, had worked on the captioned case prior to its litigation stage, while he was a member of Mr. Baer's law firm. Mr. Baer stated his opinion that in view of his information, I should not file my motion and brief. I informed him that they had been filed earlier in the day.

5. Mr. Baer erroneously states in his affidavit that the telephone conversation referred to in paragraph 4 supra took place on July 19, 1985. Although he accurately states

that I had told him that the ORC motion and brief had been filed earlier on the day of the conversation, the conversation and filing both occurred on July 26, 1985, the filing having taken place at about noon and the telephone conversation in the mid-afternoon.

6. I spoke for the first time with Thomas Geiser on July 26, 1985, after the conversation with Mr. Baer referred to above. We did not discuss ORC's position or papers, or the views of respondents. Mr. Geiser, at my request, simply confirmed that while a member of Mr. Baer's law firm, he had worked on the case in its early stages.

7. I have shared no information concerning ORC's position with any other lawyer of EBB&G and have received no information, beyond that

contained in their petition itself, from anyone purporting to have represented respondents at anytime.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and accurate.

Henry Rose

Henry Rose
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(202) 861-0900

Dated: August 23, 1985

City of Washington)
) ss:
District of Columbia)

I, Diana L. Richardson, a Notary Public, hereby certify that on the 23rd day of August, 1985, there personally appeared before me Henry Rose, who acknowledged signing the foregoing document and that the statements contained therein are true.

Diana L. Richardson
Notary Public

DIANA L. RICHARDSON
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires November 14, 1988